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DEPT. OF TRANSPORTATION  
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**BEFORE THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION  
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION  
OFFICE OF CHIEF COUNSEL**

**In the Matter of:**

**Duckpond, Inc.  
d/b/a T.E.C./Northeast Fire Systems,  
Respondent.**

**PHMSA Case No. 06-0167-CR-EA  
Docket No. PHMSA-2009-0127**

**ORDER OF THE CHIEF COUNSEL**

This matter is before the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) for a determination regarding the Notice of Probable Violation (Notice), issued to T.E.C. Northeast Fire & Safety d/b/a Duckpond, Inc.<sup>1</sup> (Respondent), on October 18, 2006. The Notice proposed a civil penalty in the amount of \$7,000 for the following five (5) violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180:

Violation 1: Representing, certifying and marking DOT specification cylinders as having been successfully retested in accordance with the HMR, when the test equipment was not verified to be accurate within  $\pm 1\%$  of the calibrated cylinder's test pressure and corresponding expansion values, in violation of 49 C.F.R. §§ 171.2 (a), (c), (g), & (j), and 180.205 (g)(4);

Violation 2: Representing, certifying and marking DOT specification cylinders as having been successfully retested in accordance with the HMR, when cylinder retesting was performed by a person not approved as prescribed by the HMR, in violation of 49 C.F.R. §§ 107.805 (g), 171.2 (a), (c), (g), & (j), and 180.3 (a);

Violation 3: Representing, certifying and marking DOT specification cylinders as having been successfully retested in accordance with the HMR, without maintaining complete and accurate retest and reinspection records, in violation of 49 C.F.R. §§ 171.2 (a), (c), (g), & (j), and 180.215 (b)(1)-(2);

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<sup>1</sup> Although the Notice was issued using this name, the exit briefing, signed by Respondent's representative, lists the company name as Duckpond Inc. d/b/a T.E.C./Northeast Fire Systems, and correspondence from Respondent's attorney states that T.E.C. Northeast Fire & Safety is a d/b/a of Duckpond, Inc. Additionally, Respondent's letterhead lists the company name as T.E.C./Northeast Fire Systems. This Order is directed to the name I believe to be correct for the company. Further, although the legal name of the company may be ambiguous, the names are clearly related and reflect the responsible party in this action.

Violation 4: Representing, certifying and marking DOT specification cylinders as having been successfully retested in accordance with the HMR, while failing to maintain copies of applicable CGA pamphlets governing cylinders being requalified, in violation of 49 C.F.R. §§ 171.2 (a), (c), (g) & (j), and 180.215 (a)(6); and

Violation 5: Representing, certifying and marking DOT specification cylinders as having been successfully retested in accordance with the HMR, while (1) failing to provide its hazmat employees Security Awareness training and (2) failing to maintain hazmat training records, in violation of 49 C.F.R. §§ 171.2 (a) & (c), 172.702 (b), and 172.704 (d).

As an initial matter, I must consider whether Respondent's business activities bring Respondent within the jurisdiction of this agency. Respondent is a DOT-authorized hydrostatic retester and requalifier of DOT specification cylinders, retester identification number (RIN) D589. Therefore, Respondent is subject to the jurisdiction of the Secretary of Transportation, PHMSA's Associate Administrator for Hazardous Materials Safety, and PHMSA's Office of Chief Counsel.<sup>2</sup>

### **Background**

On March 31, 2006, a PHMSA inspector conducted a compliance inspection at Respondent's facility in Altamont, New York, where he reviewed the company's retest records and procedures. During the course of the inspection, the inspector reviewed Respondent's "Hydrostatic Water Jacket Retest Data Sheets" (Test Records) and "Verification Data for Water Jacket Testing" forms (Calibration Records) dated January 23, 27, 31, and February 6, 8, 13, 14, 22, 23, 2006. The Test Records indicate that Respondent tested cylinders using a test pressure of 3,000 psi. The corresponding Calibration Records indicate that the calibration readings for 3,000 psi ranged from 1.3 to 5.7 percent.

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<sup>2</sup> See 49 U.S.C. § 5103 (2006); 49 C.F.R. § 107.301 (2006).

The Test and Calibration Records indicated that the retest operator was "STM." During the inspection interview, Mr. Tim Coughtry (Respondent's representative) informed the inspector that Sean McGowan was one of the two employees who performs testing, and that he had been an employee of Respondent for approximately six months. Further, Respondent's representative told the inspector that he did not notify the PHMSA of Respondent's new retester.

In reviewing the Test and Calibration Records, the inspector also noted that they were not completed fully. Specifically, the test operator did not indicate the permanent expansion for the calibrated cylinder on the Calibration Records. The Test Records were missing the elastic expansion readings. Finally, an additional Test Record, dated January 5, 2006, was missing the disposition code as well as the elastic expansion.

Because the Test Records indicated that Respondent requalified steel (DOT-3A) and aluminum (DOT-3AL) cylinders, the inspector inquired about CGA pamphlets on hand. The inspector observed a CGA-5 pamphlet, but Respondent's representative told the inspector that he did not have copies of the CGA-6 or CGA-6.1 pamphlets, which he was also required to have on site.

Finally, the inspector reviewed Respondent's training program. Respondent's representative told the inspector that Trent Schifferdecker, one of the two retesters, received "full hazmat" training, but Respondent's representative could not provide any training records. Additionally, Respondent's representative stated that Mr. McGowan received on-the-job training, but Respondent's representative did not prepare any training records. Neither employee received security awareness training according to Respondent's representative.

In response to the exit briefing, Respondent's representative sent a letter, dated April 27, 2006, to the inspector that detailed corrective actions taken and attached evidence of these

actions. The letter stated that Respondent instituted a review procedure for the calibration results and records and informed its personnel of the proper procedure. The letter also said that Respondent will inform PHMSA if there is a new or change in retester. Finally, Respondent stated that it is in the process of obtaining training for its staff. The letter also included the following enclosures: a letter dated April 26, 2006 stating that "a company meeting was held for the purpose of viewing and discussion of hazmat transportation and security awareness training module" and was attended by Respondent's employees: Mr. Schifferdecker, Mr. McGowan, Tim George, and Mr. Coughtry; a price quote for on-site function specific training; a completed registration form and confirmation of registration for Operational and Hazmat Cylinder Re-qualification Training for Mr. Coughtry; an invoice for the purchase of CGA pamphlets C-6, C-6.1, C-6.3, and C-1; and an exam on cylinder requalification to be administered to Respondent's retesters.

In response to the NOPV, on November 20, 2006, Respondent emailed the PHMSA attorney an informal response and a request for an informal conference (Response). The Response detailed a number of issues Respondent wished to discuss. An informal conference was scheduled for and held on February 10, 2007. During the informal conference, Respondent's representative said that he would submit copies of new retest records, training invoices, and financial information for the company, as well as notify the Approvals and Special Permits Office of personnel changes. On February 15, 2007, an attorney for Respondent sent a letter to PHMSA with documentation of function specific, general awareness, and security awareness training for Allen Burke, Mr. George, Mr. McGowan, and Aaron Ward and requested reconsideration of the penalty based on Mr. Coughtry's poor health and the company's financial situation. On April 8, 2007, Respondent's attorney faxed the following additional

documentation: a letter to the U.S. Department of Transportation, dated March 23, 2007, stating that Mr. Burke, Mr. George, Mr. McGowan, and Mr. Ward were employed by Respondent to perform hydrostatic testing of cylinders; a 2006 profit and loss statement showing a net loss of \$4,789.38; copies of Calibration Records dated February 19, 22, and March 5, 6, 16, 20, 2007<sup>3</sup>; and copies of Test Records dated February 19, 22, and March 5, 6, 16, 2007.<sup>4</sup>

On June 14, 2007, a PHMSA attorney contacted Respondent's attorney requesting copies of tax returns to evaluate Respondent's claim of financial hardship. The PHMSA attorney sent a follow-up letter on August 24, 2007, requesting the same information, but as of this date received no response to either inquiry. The case now comes before the Chief Counsel for decision.

### **Discussion**

Violation 1 of the Notice alleges that Respondent represented, certified and marked DOT specification cylinders as having been successfully retested in accordance with the HMR when the test equipment was not verified to be accurate within  $\pm 1\%$  of the calibrated cylinder's test pressure and corresponding expansion values, in violation of 49 C.F.R. §§ 171.2 (a), (c), (g), & (j), and 180.205 (g)(4). The Calibration Records observed during the inspection show that the test equipment calibration deviated beyond one percent, ranging from 1.3 to 5.7 percent for 3,000 psi, the pressure used in testing as reflected on Respondent's Test Records. Respondent did not contest this violation. Although Respondent submitted new Calibration Reports, the deviation was still beyond one percent and therefore did not reflect corrective action.

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<sup>3</sup> The right-hand side of these sheets was missing from all of these documents such that the Permanent Expansion and Percent Deviation cannot be verified. The exception is the record dated February 19, 2007, where the data was completed in the left-hand column. Here, the Permanent Expansion column was completed; however, the percent deviation was 6.6, and therefore does not demonstrate corrective action.

<sup>4</sup> The right-hand side of these sheets was also missing from these documents such that the Disposition Code and Retest Operator columns were not visible. The Elastic Expansion column was completed on all of the forms.

Violation 2 of the Notice alleges that Respondent represented, certified and marked DOT specification cylinders as having been successfully retested in accordance with the HMR when cylinder retesting was performed by a person not approved as prescribed by the HMR, in violation of 49 C.F.R. §§ 107.805 (g), 171.2 (a), (c), (g), & (j), and 180.3 (a). Respondent's Test Records indicate that Mr. McGowan conducted cylinder requalification, and Respondent's representative admitted to the inspector that he did not notify PHMSA of this change in personnel. Subsequent to the Notice, Respondent provided the names of its retesters to PHMSA.

Violation 3 of the Notice alleges that Respondent represented, certified and marked DOT specification cylinders as having been successfully retested in accordance with the HMR when complete and accurate retest and reinspection records had not been maintained, in violation of 49 C.F.R. §§ 171.2 (a), (c), (g), & (j), and 180.215 (b)(1)-(2). The Test Records reviewed in the course of the inspection were missing the requisite elastic expansion readings, and one record was also missing the disposition code. Respondent did not contest this violation, and submitted subsequent Test Records that have all of the requisite readings completed.

Violation 4 of the Notices alleges that Respondent represented, certified and marked DOT specification cylinders as having been successfully retested in accordance with the HMR while failing to maintain copies of applicable CGA pamphlets governing cylinders being requalified, in violation of 49 C.F.R. §§ 171.2 (a), (c), (g) & (j), and 180.215 (a)(6). Respondent did not have on hand the requisite CGA pamphlets applicable to Respondent's requalification activities. Respondent did not contest this violation, and provided documentation of its purchase of the pamphlets.

Finally, Violation 5 of the Notice alleges that Respondent represented, certified and marked DOT specification cylinders as having been successfully retested in accordance with the

HMR while failing to provide its hazmat employees Security Awareness training and failing to maintain hazmat training records, in violation of 49 C.F.R. §§ 171.2 (a) & (c), 172.702 (b), and 172.704 (d). Respondent was unable to provide the inspector documentation of its employees' training, but did submit documentation of training records subsequent to the Notice.

### **Findings**

Based on the facts detailed above, I find there is sufficient evidence to support a finding that Respondent knowingly violated the HMR as set forth in the opening to this Order with respect to Violations 1–4. With respect to Violation 5, I find that Respondent violated the HMR by failing to maintain training records for its employees; I do not make a finding of violation for failure to provide Security Awareness training because no penalty was assessed in the Notice. In reaching this conclusion, I have reviewed the inspector's Inspection/Investigation Report and accompanying exhibits, the exit briefing, Respondent's replies, and all other correspondence in the case file.

### **Conclusion**

Under the authority of 49 U.S.C. § 5123 and 49 C.F.R. §§ 107.317 and 107.329, I hereby assess a civil penalty against Respondent in the amount of \$6,435. In assessing this civil penalty, I have taken into account the following statutory criteria (49 U.S.C. § 5123 (c) and 49 C.F.R. § 107.331):

1. The nature, circumstances, extent, and gravity of the violations;
2. With respect to the Respondent, its degree of culpability, any history of prior violations, its ability to pay, and any effect on its ability to continue to do business; and
3. Other matters as justice may require.

After mitigation for corrective action, the penalty is allocated as follows:



Violation No. 1: \$3,285, as proposed in the Notice;<sup>5</sup>  
Violation No. 2: \$675, reduced from \$900 in the Notice;<sup>6</sup>  
Violation No. 3: \$1,500, reduced from \$1,800 in the Notice;<sup>7</sup>  
Violation No. 4: \$675, as proposed in the Notice;<sup>8</sup>  
Violation No. 5: \$300, reduced from \$340 in the Notice.<sup>9</sup>

Although Respondent's most recent correspondence claimed financial hardship, Respondent has not provided a certified accounting statement or tax return to substantiate its claim.

Payment of the civil penalty is due within thirty (30) days of receipt of this Order, in accordance with the instructions contained in Addendum A. Respondent may appeal this Order to PHMSA's Administrator within twenty (20) days of receipt of this Order.

April 28, 2009  
Date

Sherri Pappas  
Sherri Pappas  
Acting Chief Counsel

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

<sup>5</sup> The notice proposed a penalty amount that included a ten percent (10%) reduction for corrective action. Although the evidence does not support this reduction, I am bound by the proposed penalty in the Notice.

<sup>6</sup> The penalty reflects a twenty five percent (25%) reduction for corrective action. Respondent submitted additional documentation of corrective action subsequent to the notice warranting a further reduction in penalty.

<sup>7</sup> The penalty reflects a twenty five percent (25%) reduction for corrective action. Respondent submitted additional documentation of corrective action subsequent to the notice warranting a further reduction in penalty.

<sup>8</sup> The notice proposed a penalty amount that included a twenty five percent (25%) reduction for corrective action.

<sup>9</sup> The penalty reflects a twenty five percent (25%) reduction for corrective action. Respondent submitted additional documentation of corrective action subsequent to the notice warranting a further reduction in penalty.

## CERTIFICATE OF SERVICE

This is to certify that on APR 28 2009 the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Duckpond, Inc.  
d/b/a T.E.C. Northeast Fire Systems  
100 Park Street  
Altamont, NY 12009  
Attn: Jo Ann Coughtry, Esq.

Original Order with Enclosures  
Certified Mail Return Receipt

Ryan Posten  
Director, OHME

One Copy  
Electronic Mail

Colleen Abbenhaus, Chief  
Hazardous Materials Enforcement Office  
Eastern Region

One Copy  
Electronic Mail

U.S. DOT Dockets, M-30  
U.S. Department of Transportation  
West Building Ground Floor, Room W12-14  
1200 New Jersey Ave., SE  
Washington D.C. 20590

One Copy  
Personal Delivery

Ted Willke, Associate Administrator  
for Hazardous Materials Safety

One Copy (without enclosures)  
Electronic Mail

Bob Richard, Deputy Associate Administrator  
for Hazardous Materials Safety

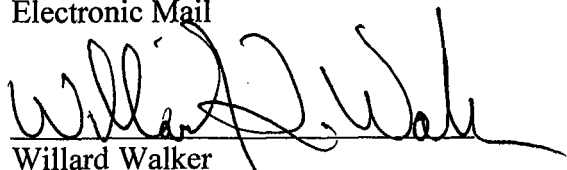
One Copy (without enclosures)  
Electronic Mail

Tonya Schreiber, Executive Director  
for Hazardous Materials Safety

One Copy (without enclosures)  
Electronic Mail

Tom Seymour, Esq.  
Office of Chief Counsel

One Copy (without enclosures)  
Electronic Mail

  
Willard Walker  
Unispec Enterprises, Inc.

Appeal Information

If Respondent chooses to appeal, Respondent must:

- (1) File a written appeal within twenty (20) days of receiving this Order; a submission will be considered "filed" with PHMSA on the date it is received by PHMSA;
- (2) Address the appeal to the Administrator, Pipeline and Hazardous Materials Safety Administration, c/o Office of Chief Counsel, 1200 New Jersey Ave., SE, PHC – East Building 2<sup>nd</sup> Floor, Washington, DC 20590; and
- (3) State with particularity in the appeal the grounds for challenging the finding that Respondent is in default.

The appeal must include all relevant information and documentation. PHMSA will not consider any arguments or information not submitted in or with the written appeal.

PHMSA will regard as untimely, and will not consider, any appeal that is received after the twenty (20) day period. PHMSA recommends the use of fax (202.366.7041) or an overnight service. An appeal received by PHMSA more than twenty (20) days after receipt of the Order by Respondent will not be considered and will not toll the deadline for payment of the civil penalty assessed in the Order.

Payment of Civil Penalty

The U.S. Department of Transportation's Federal Aviation Administration (FAA) is authorized to receive and process payments of civil penalties assessed by PHMSA. Respondent must pay the civil penalty by (1) wire transfer, (2) certified check or money order, or (3) credit card via the Internet, in accordance with the following instructions.

(1) Wire Transfer.

Detailed instructions for sending a wire transfer through the Federal Reserve Communications System (Fedwire) to the account of the U.S. Treasury are contained in the enclosure to this Order. Please direct questions concerning wire transfers to:

AMZ-341  
Federal Aviation Administration  
Mike Monroney Aeronautical Center  
P.O. Box 269039  
Oklahoma City, OK 73125  
Telephone (405) 954-8893

(2) Check or Money Order.

Make check or money order payable to "U.S. Department of Transportation" (include the Ref. No. of this case on the check or money order) and send to:

AMZ-341  
Federal Aviation Administration  
Mike Monroney Aeronautical Center  
P.O. Box 269039  
Oklahoma City, OK 73125

(3) Credit Card.

To pay electronically using a credit card, visit the following website address and follow the instructions:

<https://www.pay.gov/paygov/>

Interest and Administrative Charges

If Respondent pays the civil penalty by the due date, no interest will be charged. If Respondent does not pay by that date, the FAA's Financial Operations Division will start collection activities and may assess interest, a late-payment penalty, and administrative charges under 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 49 C.F.R. § 89.23.

The rate of interest is determined under the above authorities. Interest accrues from the date of this Order. A late-payment penalty of six percent (6%) per year applies to any portion of the debt that is more than 90 days past due. The late-payment penalty is calculated from the date Respondent receives the Order.

Treasury Department Collection

FAA's Financial Operations Division may also refer this debt and associated charges to the U.S. Department of Treasury for collection. The Department of the Treasury may offset these amounts against any payment due Respondent. 31 C.F.R. § 901.3.

Under the Debt Collection Act (see 31 U.S.C. § 3716(a)), a debtor has certain procedural rights prior to an offset. You, as the debtor, have the right to be notified of: (1) the nature and amount of the debt; (2) the agency's intention to collect the debt by offset; (3) the right to inspect and copy the agency records pertaining to the debt; (4) the right to request a review within the agency of the indebtedness and (5) the right to enter into a written agreement with the agency to repay the debt. This Order constitutes written notification of these procedural rights.

**INSTRUCTIONS FOR ELECTRONIC FUNDS TRANSFER TO  
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,  
U.S. DEPARTMENT OF TRANSPORTATION**

1. <u>RECEIVER'S ABA NO.</u> 021030004	2. <u>TYPE SUBTYPE</u> (provided by sending bank)
3. <u>SENDING BANK ARB NO.</u> (provided by sending bank)	4. <u>SENDING BANK REF NO.</u> (provided by sending bank)
5. <u>AMOUNT</u>	6. <u>SENDING BANK NAME</u> (provided by sending bank)
7. <u>RECEIVER NAME:</u> TREAS NYC	8. <u>PRODUCT CODE</u> (Normally CTR, or sending bank)
9. <u>BENEFICIAL (BNF) – AGENCY LOCATION CODE</u> BNF=/ALC-69-14-0001	10. <u>REASONS FOR PAYMENT</u> <i>Example: PHMSA Payment for Case #/Ticket</i>

**INSTRUCTIONS:** You, as sender of the wire transfer, must provide the sending bank with the information for Block (1), (5), (7), (9), and (10). The information provided in blocks (1), (7), and (9) are constant and remain the same for all wire transfers to the Pipeline and Hazardous Materials Safety Administration, Department of Transportation.

**Block #1** - RECEIVER ABA NO. - "021030004". Ensure the sending bank enters this nine digit identification number; it represents the routing symbol for the U.S. Treasury at the Federal Reserve Bank in New York.

**Block #5** - AMOUNT - You as the sender provide the amount of the transfer. Please be sure the transfer amount is punctuated with commas and a decimal point.

**EXAMPLE: \$10,000.00**

**Block #7** - RECEIVER NAME- "TREAS NYC." Ensure the sending bank enters this abbreviation, it must be used for all wire transfer to the Treasury Department.

**Block #9** - BENEFICIAL - AGENCY LOCATION CODE - "BNF=/ALC-69-14-0001" Ensure the sending bank enters this information. This is the Agency Location Code for Pipeline and Hazardous Materials Safety Administration, Department of Transportation.

**Block #10** - REASON FOR PAYMENT – "AC-Payment for PHMSA Case#/To ensure your wire transfer is credited properly, enter the case number/ticket number or Pipeline Assessment number."

**Note:** - A wire transfer must comply with the format and instructions or the Department cannot accept the wire transfer. You, as the sender, can assist this process by notifying, at the time you send the wire transfer, the General Accounting Division at (405) 954-8893.